U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: **December 21, 2000**

Case No.: **2000-INA-35**
CO No.: **P1999-MD-03316033**

In the Matter of:

PARVIZIAN INC. OF BALTIMORE
Employer,

on behalf of:

SHAHNAZ KARAMI
Alien.

Appearance: Ladan Mirbagheri-Smith
for Employer and Alien

Certifying Officer: Richard E. Panati
Philadelphia, PA

Before: Burke, Vittone and Wood
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. This decision is based on the record upon which the CO denied certification and the employer's request for review, as contained

in the appeal file and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 13, 1998, Parvizian Inc. of Baltimore ("Employer") filed an application for alien labor certification to enable Shahnaz Karami ("Alien") to fill the position of Administrative Assistant. (AF 30). The job duties for the position are "aids company president by coordinating office services, preparing budget, coordinating collection and preparation of operating and management reports; retrieving, storing, organizing and presenting data using [*sic*]computer." *Id.* The scheduled hours of employment are Monday through Friday, 10 a.m. to 6 p.m. *Id*. No other special requirements were listed in Item 15 of the ETA 750A. *Id.*

On July 27, 1999, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 27-28). The CO found Employer to be in violation of §§ 656.21(b)(6) and 656.20(c)(8). *Id*. Specifically, the CO noted that it is unlawful for an employer to reject U.S. applicants for lacking qualifications that were not stated as job requirements in the advertisement or on Form ETA 750A, at the time of application. *Id.* The CO noted further that a qualified U.S. applicant ("Applicant") was rejected for lacking qualifications that were not previously identified as requirements for the position. *Id.* The CO advised Employer that a pre-employment test designed to aid an employer in the subjective determination of whether an applicant is able to perform the core job duties may be a valid interview tool; however, such a subjective determination, because of its potential for abuse, is suspect and must be supported by specific facts sufficient to provide an objective, detailed basis for concluding the applicant could not perform the core duties. *Id*.

Employer's rebuttal was dated October 4, 1999. (AF 5-25). Employer asserted that the U.S. applicant was lawfully rejected because she could not perform core job duties, lacking the minimum qualifications for the position. Employer argued that it made this determination through objective means and specific facts, including the applicant's performance on a pre-employment test, which Employer alleged provided an objective and detailed basis for Employer's determination that the Alien was qualified to perform basic tasks associated with the core job duties whereas the U.S. applicant was not. *Id.*

The CO issued a Final Determination ("FD") denying certification on October 5, 1999, in which he found that Employer's response failed to satisfactorily rebut the NOF. (AF 2-4). The CO indicated that Employer's response, explaining that the pre-employment test was not graded but used to determine the basic knowledge and administrative ability of the applicants, is unacceptable because the purpose of the test is questionable. *Id.* The CO indicated further that certain sections of the pre-employment test (dictation and alphabetization) were not directly related to the position and it was not clear how poor performance on these portions established that applicants could not perform the core duties of the position. *Id.*

Employer has requested a review of the denial and the record has been submitted to the Board

of Alien Labor Certification Appeals ("Board") for such purpose.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has lawful job-related reasons for rejecting U.S. applicants.

In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *See United Parcel Service*, 1990-INA-90 (Mar. 28, 1991); *Mancil-las International Ltd.*, 1988-INA-321 (Feb. 7, 1990); *Microbuilt Corp*., 1987-INA-635 (Jan. 12, 1988). Further, an employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750 and in the advertisement for the position without interviewing that applicant. *See American Café*, 1990-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 1988-INA-492 (Sept. 19, 1990); *Richo Management*, 1988-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 1988-INA-29 (Apr. 7, 1988).

In the present case, the CO advised Employer in the NOF that a pre-employment test is "suspect because of its potential for abuse;" therefore, it must be supported by specific facts sufficient to provide an objective, detailed basis for concluding the applicant could not perform the core job duties. (AF 28). In its rebuttal, Employer argued that the Applicant's poor performance on the pre-employment test as well as her "sloppy, incomplete resume" pointed to her inability to perform the tasks indicated on the ETA 750. (AF 13). We find Employer's argument unconvincing.

The Applicant's performance on the pre-employment test does not support Employer's assertion that she was unqualified. The pre-employment test, while given to all applicants, is not related to the minimum requirements stated on the ETA 750 or in the advertisement for the position, and Employer has failed to present any detailed basis for validating the use of the employment test in this situation.

Here, Employer submitted the statement of a branch manager from a temporary employment agency, who attested to the fact that the administrative skills test utilized by Employer was an appropriate means of evaluating the core job requirements of an administrative assistant. (AF 16-19). While this statement may establish that the test would be a valid one for assessing administrative skills in general, it is not tailored to the specific job duties involved here. In this regard, the duties listed by Employer on the ETA 750 form are limited to "aids company president by coordinating office services, preparing budgets, coordinating collection and preparation of operating and management reports; retrieving, storing, organizing and presenting data using computer." While we agree that the Applicant's poor performance on the transcription portion of the test (which required her to write down a paragraph after listening to it on tape) suggests that she would be unable to perform adequately in any

job which required her to express herself well in writing, we do not find that Employer has met its burden of establishing that the test adequately measured ability to perform the listed duties or that the Applicant would be incapable of performing those specified duties. Accordingly, the test was not a lawful basis for rejection of the U.S. worker. *Lee & Family Leather Fashions, Inc.*, 1993-INA-50 (Dec. 21, 1994).

Additionally, Employer's argument that the Applicant was unqualified based upon what it perceived as inconsistencies in her resume is unfounded. If Employer found something questionable in the Applicant's resume, Employer could have easily requested clarification during the interview. While we agree that the resume was poorly done, we reject the Employer's attempt to create yet another test on this basis, due to the potential for abuse.

Because Employer has no basis to support its denial of the Applicant, we find, based upon the information properly submitted to the CO, that the denial of labor certification was proper. Accordingly, the following Order shall enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

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JOHN M. VITTONE
Chief Administrative Law Judge

JMV/jg/ktn

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition, the Board may order briefs.